***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76-2166

ORIGINAL

Argued by
ROBERT N. ZAUSMER

# United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA *ex rel.*
HERBERT EDNEY,

*Petitioner-Appellant,*

*against*

HAROLD SMITH, Superintendent,
Attica Correctional Facility,

*Respondent-Appellee.*

On Appeal from the United States District Court
for the Eastern District of New York

## BRIEF FOR RESPONDENT-APPELLEE


DENIS DILLON
District Attorney, Nassau County
*Attorney for Respondent-Appellee*
262 Old Country Road
Mineola, New York 11501
(516) 535-

WILLIAM C. DONNINO
ROBERT N. ZAUSMER
Assistant District Attorneys
*Of Counsel*

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## BRIEF FOR RESPONDENT-APPELLEE

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### Preliminary Statement

HERBERT EDNEY appeals from an order of the United States District Court for the Eastern District of New York (WEINSTEIN, J.), entered November 24, 1976, dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254.

The writ was directed to a judgment of the County Court of Nassau County (LAPERA, J.), rendered May 3, 1974 convicting Herbert Edney, after a jury trial, of manslaughter in the first degree, kidnapping in the first degree and kidnapping in the second degree, and sentencing him to a term of imprisonment of up to twenty-five years each for man-

slaughter in the first degree and kidnapping in the second degree and to a term of twenty-five years to life for kidnapping in the first degree, said sentences to be served concurrently.

## Opinions in the Case

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on April 7, 1975, unanimously affirmed Edney's judgment of conviction with a memorandum. *People* v. *Edney*, 47 A.D.2d 906 (2d Dept. 1975).

The order of the Appellate Division was, on June 8, 1976, affirmed by the Court of Appeals of the State of New York with an opinion. *People* v. *Edney*, 39 N.Y.2d 620 (1976).

The opinion and order of District Court Judge WEINSTEIN denying Edney's petition for a writ of habeas corpus is reproduced in the appendix, pages A-0–A-44.

## The Issue Presented

Whether the Sixth Amendment precludes the State from introducing, on rebuttal, the testimony of a psychiatrist on the question of a defendant's sanity at the time of the commission of the crime, where (1) the psychiatrist's pre-trial interview-examination of the defendant was at the request of the defendant's counsel; (2) the defendant had interposed the defense of insanity; and (3) the defendant had testified at trial, before the psychiatrist testified, to the same facts he had related to the psychiatrist in the pre-trial interview.

## The Crime

On July 24, 1968, at approximately 10:30 p.m. the lifeless body of eight-year old Lisa Washington was discovered by Nassau Patrolmen Robert Donohue and Vincent Cummo in a courtyard at 322 Nassau Road behind the Nu-Way Lounge in Roosevelt, New York. She had been stabbed eleven times.

The officers had been directed to the scene after receiving a phone call from Miss Velva Wallace, whose home porch overlooked the courtyard area. She had reported a disturbance behind the bar involving a man and what appeared to be a woman or a young girl shortly before the discovery of the body.

Investigation by Patrolman Donohue at the scene led him to believe the deceased might have been in the Nu-Way Lounge before her death. Thereafter, Detective Robert Brice spoke with the owner of the bar, Mr. Peterson, who told him that the girl had been in the Nu-Way Lounge earlier that evening with Herbert Edney, the defendant. During this time, Sergeant Robert Cline of the Scientific Bureau of Investigation took soil and blood samples of the area adjacent to the body of the deceased.

Detective Brice and three other police officers then proceeded to the Hempstead address of defendant's former wife and, later, to the home of his brother, William Edney, Jr. Failing to locate defendant at either place, the officers returned to the First Precinct in Baldwin at approximately 2:30 a.m. There, it was learned that defendant might be found at his father's home at 35 Andrews Avenue in Roosevelt.

At approximately 2:45 p.m., Detective Brice and three other patrolmen went to that address. They apprised defendant's father, William Edney, Sr., of the fact that they were there in connection with a homicide involving a little girl. Mr. Edney replied, "Do you mean the little girl that had been in here earlier this evening?" When the officers responded in the affirmative, Mr. Edney let them into the house and directed them to a bedroom where he indicated defendant could be found.

The officers entered the room, found defendant asleep on the bed, awakened him, placed him under arrest and advised him of his constitutional rights. After dressing, as he was being escorted from the house, defendant was stopped in the living room by his father who asked, "Herbert, you didn't hurt that little girl or harm that little child you had here earlier, did you?" Defendant hung his head and said "I'm sorry, I'm sorry."

At the First Precinct, defendant was interviewed by Detective Henry Andreoli of the Homicide Squad. He was generally unresponsive, but did discuss certain details concerning the crime. Defendant gave one statement, at 4:40 a.m., to the effect that he wanted to see a psychiatrist and to be examined by a doctor.

While at the First Precinct, defendant's shoes were removed. Fingernail scrapings were taken from him by Sergeant Cline around 4:30 a.m. At 5:00 a.m. Detective John McAuley conducted a routine pat-down search of defendant at which time he removed some granules of dirt from defendant's pants pocket.

[Subsequent scientific examination confirmed that soil samples removed from defendant's shoes and pants pockets were identical in composition to a soil sample which had been taken from the crime scene behind the bar.]

At approximately 8:00 a.m. defendant was taken to police headquarters in Mineola. Later that morning, his clothes were removed and he was given a change of clothing.

At 10:30 a.m., after the completion of the processing of his arrest, as defendant was being escorted out of the Homicide Squad office, he turned to Lieutenant Daniel Guido and commenced a conversation with him. As a result of this conversation, defendant agreed to give a statement to Detective Andreoli. In substance, defendant stated that he had been in the Nu-Way Lounge with Lisa, that he had been hearing "voices" and that he might have killed Lisa but he was not sure that he had done so. He was unable to recall any of the events surrounding her death.

Defendant was arraigned later that morning.

## THE TRIAL

### People's Case

**Vincent Gordon,** 15 years old, testified that on July 24, 1968 he was 9 years of age and resided at 203 Princeton Street in the same building as Lucille Glenn (70-71).*

Sometime around 3:00 p.m. he saw defendant, whom he had seen on those premises on previous occasions, arrive in a white car which someone then drove away (74-75, 84). Defendant went upstairs and Lisa Washington, who had been sitting on the steps as defendant arrived, followed him upstairs (76).

At approximately 5:00 p.m. that day, he saw Lisa playing in the backyard near a driveway (76-77). Defendant called to her from the driveway "Let's go to the store" (77). Lisa went with the defendant up the street along with one of her friends named "Lee Lee" (77). As they approached the corner of the street, a green and white cab was there (78-79). Defendant opened the cab door, grabbed Lisa by the arm and pushed her in (79). He also tried to get "Lee Lee" but she slipped away and ran back up the street (79).

**Sharon Spradley,** 16 years old, testified that on the afternoon of July 24, 1968 she was 10 years old and was visiting her grandmother who lived at 204 Princeton Street (86-88, 90, 92). Her testimony was substantially the same as Vincent Gordon's with the exception that she was unable to to identify the defendant (87-90).

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* Numbers refer to the Minutes of Trial.

**Clara Roberts** said she was known as Clara Washington in July 1968 (106). She became Mrs. Roberts when she married in 1971 (111). Mrs. Roberts had known defendant since 1962 and had lived with the defendant on and off between 1963 and 1968 (107, 111-112). She had one child in July of 1968, an 8-year old girl named Lisa Washington (107). Defendant was not the child's father (110).

Mrs. Roberts began living with the defendant at 820 Boynton Avenue in the Bronx in late 1967 (108, 112, 119). She continued to live with the defendant at that address until July 22, 1968, when she moved out of the apartment (107-108). Lisa was also living with Mrs. Roberts at the time (115-116).

Mrs. Roberts had discussed with defendant her leaving him several times dating back to early 1968 (108-109, 124). When she had first brought up the subject at that time, defendant told her that if she ever left him and he found her he would kill her (109, 123). He also said that if he did not find her he would kill her sister, Geneva Washington, or her cousin, Betty Taylor (109).

Sometime around June 30, 1968, Mrs. Roberts had sent Lisa to live with her sister at 201 Princeton Street, Hempstead (109, 116). Mrs. Roberts stated that at no time thereafter, including July 24, 1968, did she give defendant permission to take Lisa from Mrs. Glenn's custody (109).

**Lucille Glenn** said that she was the sister of Clara (Washington) Roberts (127).

In July 1968, Mrs. Glenn resided at 201 Princton Street, Hempstead, with her husband, Amos, her brother-in-law,

Willie Glenn, her mother, Mrs. Lottie Washington, her niece, Lisa Washington, and her girlfriend's daughter "Lee Lee" Moore (128-129, 138-140, 142). Lisa had come to live with her on June 29, 1968 (129, 137).

On July 23, 1968, she had a conversation with defendant in the living room of her home on Princeton Street in the presence of her mother, Lottie Washington, and her brother-in-law (129-130). Shortly before this date, Clara had called her and told her that she had moved out from the defendant's apartment (147). Defendant asked Mrs. Glenn if she knew that Clara had moved out on him and had taken all the furniture in the apartment (130). He also wanted to know where she was (130). Mrs. Glenn told defendant she was aware of what had occurred and that she would not tell defendant where Clara was and would not try to contact Clara on the phone (130).

Defendant then said to Mrs. Glenn that if the furniture and money which Clara had taken from him were not recovered he was going to "hurt the closest thing" to Clara (130, 147-148). She said that defendant appeared sober at this time and that he was not smiling (148).

On July 24, 1968, Mrs. Glenn had another conversation with defendant sometime between 3:30 and 4:00 p.m. in her living room (131, 149). Mrs. Glenn said to defendant, "Didn't I tell you not to bring your ass to my house again" (131, 150). Defendant laughed and said to her "I am not joking, I mean what I say" (131, 150). Defendant then said he was going to get some beer (131, 150). Mrs. Glenn told him "I don't give a damn what you are going to get just get the hell out" (132, 150).

At that point, Mrs. Glenn's husband came into the apartment (132, 153). She and her husband went to the bedroom and got into an argument (132, 150-151). When they emerged from the bedroom approximately 30 to 40 minutes later, Lisa, Lee Lee and the defendant were gone (135).

Mrs. Glenn went downstairs where she saw Lee Lee coming up the street by herself (132, 152). She then asked a little girl across the street if she had seen Lisa and discovered that defendant had taken her away in a cab (132, 154). Mrs. Glenn became nervous and upset because she remembered what defendant had said to her the day before about hurting the closest thing to Clara (161).

She went upstairs and called the Hempstead police and told them that defendant had taken Lisa with him and that she did not want her with the defendant (132, 154). Approximately 45 minutes later (5:45 p.m.) she again called the police and repeated what she had told them earlier (132, 154). She then called defendant's mother and his brother, William Edney (133, 156). During this time her husband, her brother-in-law and some neighbors went outside to look for defendant and Lisa (133).

Sometime later that evening, between 8:30 to 9:00 p.m., Mrs. Glenn received a call from the defendant (133, 162). Defendant said to her "If you don't get 'C' (Defendant's nickname for Clara) on the phone in the next couple of hours, I am going to rape and kill Lisa" (133-134, 162). The witness said that defendant's voice at this time sounded calm and normal (163). She told defendant to bring Lisa home (134, 163-164). She did not recall the defendant's immediate response but she said that the conversation

ended with her and defendant exchanging profanities (134, 162). Mrs. Glenn did not believe defendant was serious about his threat and told that to him (162-164).

Mrs. Glenn stated that at no time including July 24, 1968, did she give defendant permission to take Lisa from her custody (137).

**Lottie Washington** said that she was the mother of Lucille Glenn and Clara (Washington) Roberts and the grandmother of Lisa Washington (165-167).

On July 23, 1968, defendant came to their apartment and said that he wanted to find Clara (167-168, 178). Mrs. Washington had learned on the previous evening that her daughter, Clara, had left the defendant (178). Mrs. Washington told him that Clara was not there and defendant insisted that she was and refused to leave until he saw her (168-169, 178).

On July 24, 1968, defendant returned to the apartment and had a conversation with Mrs. Washigton's daughter, Lucille Glenn (169). Defendant said to Lucille that if he did not find Clara he was going to hurt the closest thing to her (169).

At this point, Lucille's husband came in and he and Mrs. Glenn went to the bedroom to discuss something (181-182). Defendant then said he was going to go to the store for some beer (182-183). Lisa was playing outside at the time and after defendant left she never saw Lisa again (169-170, 183). Mrs. Washington went downstairs, spoke to some children and then went to the store but was unable to find the defendant (170).

Mrs. Washington testified that she did not give defendant permission to take Lisa away from the house (170).

**Joan Turner** testified that on July 24, 1968, she was employed as a barmaid in the Nu-Way Lounge in Roosevelt (207, 234). She said that she had known the defendant prior to that date since they had gone to Hempstead High School together (209, 234).

Miss Turner arrived at work at the bar at 9:30 p.m. on July 24, 1968, and saw defendant there when she arrived. Defendant was in the bar with a little girl and when she walked up to him and said "Hello," he said, "Hello, Joan" (211, 234, 237). Defendant seemed to be staring off into the middle of space (211, 237). Meanwhile, the little girl was running around the bar, dancing and singing to the music being played on the jukebox (211, 234-235).

Defendant and the girl were there for about one-half hour and then left (211). About five minutes later, defendant and the girl returned and they both went to the rear of the bar near the restrooms (211-212, 235). A few minutes later they left the bar again (212-213, 235-236). As defendant left the bar with the little girl they turned towards the right (213, 236). A few minutes later she saw the defendant appear to be coming from around the corner of the bar (213). This time defendant was alone (213).

**Lay Warren** testified that on July 24, 1968, at approximately 9:30 p.m. he had been a customer in the Nu-Way Lounge (257-258). He saw defendant, whom he had known for approximately 10-12 years, in the bar (258-260).

Defendant was with a little girl whom he told Mr. Warren was his daughter (259). He asked Mr. Warren for a ride to drop him and the little girl off somewhere (259, 265). Mr. Warren told him that he was busy but that he would return in a few minutes (259). When Mr. Warren left the bar about 15 minutes later the defendant and the little girl were still there (260).

Mr. Warren testified that defendant appeared normal and sober to him when he spoke to him in the bar (260, 263).

**Velva Wallace** testified that on July 24, 1968, she resided at 322 Nassau Road, Roosevelt, next to the Nu-Way Lounge (266-267).

Miss Wallace said that at 10:00 p.m. she heard noises out in the yard which persisted for approximately 15 minutes (267). As a result she took her dog out and put the light on over the porch (267). As she peered out into the backyard she saw two figures, a man and a woman or a girl, near the garage (267). She started down towards the garage and the man said that he was after his daughter (267). Miss Wallace said she was about 20 to 25 feet away from the man and could not see him (267-268, 271-272). When she asked the man who he was, he started to answer her and then said "What's going on here is none of your concern" (267-268).

Miss Wallace then walked her dog about halfway down into the yard and saw that "something was wrong" (268, 271-272). She grabbed her dog, turned around and ran back to the house to call the police (268). Just as she got back

to her house, all sound ceased in the backyard (268). She put the dog back on the leash and went out to the yard and saw a small bundle lying there in approximately the same area where she had first seen the two figures in the darkness (269-270). She then ran back into the house and called police (269).

**Sergeant Robert Cline** testified that on July 24, 1968, he was a forensic chemist with the Scientific Investigation Bureau of the Nassau County Police Department (280-281).

At approximately 11:45 p.m. on that date, he responded to the back of the Nu-Way Lounge at 324 Nassau Road, Roosevelt (282). Sergeant Cline examined the crime scene, took a blood sample from beneath the body of the deceased girl and took a soil sample from a point adjacent to the body of the girl (283-285). He observed that the deceased had been stabbed 11 times (284-285, 310).

At approximately 4:00 a.m. that morning, Sergeant Cline went to the First Precinct stationhouse in Baldwin where Sergeant McAuley instructed him to take fingernail scrapings from the defendant (287-317). Sergeant Cline's examination of the defendant's right hand revealed a longitudinal one-half inch scar on the right thumb between the base of the thumb and the knuckle (288). On defendant's left hand was a recent half-inch laceration on the thumb pad which was covered by two compress bandages (288-289). The sergeant also observed a one-eighth inch by one inch blood streak above defendant's left wrist just below his wrist watch (289). An examination of the fingernail scrapings revealed minute particles of blood under the pinky finger of defendant's right hand and also revealed

traces of blood beneath each fingernail on his left hand (289).

Sergeant Cline later performed a "comparison analysis" on two soil samples taken from defendant's shoes and pockets and the sample he had taken from the area where the deceased was found (291-292, 312-313). He determined that each sample had come from the rear of the Nu-Way Lounge adjacent to the body of the deceased (292, 312-315, 319-320).

**Detective Robert Brice** testified that on July 24, 1968, he was a member of the Nassau County Police Department assigned to the Crime Prevention Unit (331-332).

At approximately 10:00 p.m. he proceeded to the crime scene behind the Nu-Way Lounge where he saw the body of a young child (340-343). The detective went to the front of the bar where he spoke to another patrolman and the manager of the bar, Mr. Patterson (342-343). He escorted Mr. Patterson to the courtyard behind the bar and showed him the child's body (343-345). Mr. Patterson told Detective Brice that the child had been in the bar with the defendant a few minutes beforehand (345, 349-350).

At 2:45 a.m. Detective Brice and three other officers proceeded to defendant's father's home at 35 Andrews Avenue in Roosevelt (332). The detective explained to Mr. Edney that they had come to the house pursuant to an investigation of a homicide. Mr. Edney asked who had been murdered and Detective Brice replied, "A little girl." Mr. Edney then said, "Do you mean the little girl who had been here earlier this evening?" and the detective replied in the af-

firmative. With that, Mr. Edney let the officers come into the house and led them to a bedroom where defendant was sleeping (332-333, 356-360).

The officers entered with their guns drawn, awakened defendant and told him he was under arrest for the murder of an eight-year old female black. Detective Brice then advised him of his constitutional rights and defendant, who had now been awake for several minutes, indicated that he understood his rights. Defendant dressed quickly, was handcuffed and he proceeded out of the bedroom in the officers' custody. Detective Brice stated that defendant's physical condition appeared normal and he observed no blood on him (333-335, 364).

As the defendant was leaving the house, Mr. Edney walked up to defendant in the living room area near the front door and said to him, "Herbert, you didn't hurt that little child or harm the little child that you had here earlier, did you?" Defendant hung his head and said to his father, "I'm sorry, I'm sorry" (335).

**Detective Henry Andreoli**, a member of the Nassau County Police Department Homicide Squad, testified that he came in contact with defendant at the First Precinct at 3:30 a.m. on July 25, 1968 (459, 478). Andreoli introduced himself to defendant and advised him of his *Miranda* rights from a card (459). Defendant said he understood his rights (488).

The detective asked defendant if he knew Lisa Washington and he responded that she was his daughter and that the last time he had seen her he had put her in a yellow

cab. Defendant then gave several different descriptions of the cab. Defendant noticed a picture of Lisa on the desk and he took the picture, held it against his chest and began rocking back and forth and sobbed for a short time (461, 518).

Andreoli asked a few questions to which defendant did not respond. Defendant denied being behind the Nu-Way Bar. The detective noticed a cut on defendant's left thumb and defendant told him he had received that cut in an argument earlier that evening with his father's next door neighbor (462-463).*

He inquired as to whether defendant wished to be examined by a psychiatrist and upon receiving an affirmative response, another officer contacted six psychiatrists but was unable to get one to come to the police station (463, 492).

At approximately 4:40 a.m. Andreoli took a typewritten statement (People's Exhibit 45) from defendant after readvising him of his rights. The substance of the statement was that defendant wanted to talk to a psychiatrist and be examined by a doctor (463, 491, 512-513).

In response to additional questions by the detective, defendant related that he had purchased a knife, an Italian model with a four-inch blade, on Forty-Second Street in New York for $7.95. He had bought the knife a few days prior to the incident in order to protect himself from two

* Joseph R. Medina, defendant's father's next door neighbor, testified that at approximately 7:30 p.m. on July 24, 1968, defendant had come to his home and threatened him but that he had no physical contact with the defendant (480-482).

Spanish prostitutes with whom he had gone to a hotel room. Defendant said he had not seen the knife since he had gone to his father's house and that he had no idea where the knife was (493-494). Defendant told Andreoli that he had drank heavily during the preceding day or two and that he had also taken marijuana and LSD during that period (494-495).

At approximately 8:00 a.m., Andreoli and Detective Strauber transported defendant to police headquarters in Mineola. Some time around 10:30 a.m. Andreoli and Strauber escorted defendant out of the squad room. Defendant then turned towards Lieutenant Guido and initiated a conversation with him (467).

During the course of his discussion with the lieutenant, defendant said that he had been hearing voices which told him that God wanted Lisa. He explained that he had been hearing these voices over the past three years and that they told him to do something to Lisa. Defendant claimed that on five previous occasions the voices told him to throw Lisa off the balcony of his 14th floor apartment in New York. On the night of the murder he had also heard these voices in a bar and had gone to the bathroom and smoked half of a marijuana cigarette but was unable to "shake-off" the voices. Defendant also described a knife he had with him when he was at the bar (467-470).

Following this, defendant agreed to give a statement, which was reduced to writing (People's Exhibit 47) by Andreoli after he had advised him of his rights (468). Defendant read and signed the statement (469-470).

**Inspector Daniel Guido** of the Nassau County Police Department testified that he first came in contact with the defendant at 10:30 a.m. on July 25, 1968, at the Homicide Squad Office at police headquarters (383).

As defendant was being escorted out of the office by Detectives Anderoli and Strauber, he turned back towards the Inspector and said, "Get me a head doctor, get me a doctor." Guido asked the defendant what was the matter and defendant replied, "I want a head doctor. I want to find out if I am human or animal." Defendant said that he could not believe the charges against him and that he loved the child and would not hurt her (383-384).

Guido said to the defendant, "Well. if you want to see whether you are human or animal, maybe you did do this. Why don't you tell the truth and we will see whether we can get some help for you." Defendant claimed that he had told the truth and asked where he had lied. The Inspector replied, "You lied when you said you didn't call Lucille and tell her that if Clara didn't come with you, you would kill Lisa." Defendant said that he had called Lucille but denied making any threat (384).

Guido then turned to Detective Strauber in defendant's presence and asked the detective whether he had spoken to Lucille. Strauber indicated that he had. With that Guido looked at the defendant who said to him that he was confused and that he had been hearing voices. The Inspector asked him whether the voices told him to do anything and defendant answered that the voices had told him to send the child to God (384-385).

Defendant said that the last thing that he could remember was leaving the bar, holding the child's hand. He claimed that he had heard voices while he was in the bar and went into the bathroom and smoked one-half a marijuana cigarette but that he could not shake-off the feeling. He then came out of the bathroom, took the child by the hand and left the bar (482). Defendant claimed that the next thing he remembered was being at his father's house. He did not remember stabbing Lisa. When asked about the fact that he had told the detectives earlier that he had put Lisa in a cab after he had left the bar, defendant replied that he must have dreamt that (385-386).

Defendant also related that he had a switchblade knife with a black handle and a four-inch blade which he had purchased three weeks earlier near Times Square in New York City for about $7.50. Detective Andreoli asked defendant whether he had the knife on the previous evening and defendant replied that he had but that he had no idea what he had done with it (386).

At that point the Inspector asked defendant if he would give them a statement in writing concerning what he had just told him and defendant agreed. As Detective Andreoli started to look for some typing paper, defendant began to cry and said that he loved the child and would not hurt her and could not understand how he had done such a thing. The Inspector tried to console defendant and had no further conversation with defendant thereafter until sometime later when the defendant was leaving the office at which point he turned to Guido and said, "Thanks for listening" (386-387).

**Detective John McAuley's** testimony concerning his contact with defendant while at the First Precinct on the morning of July 25, 1968 was substantially similar to that of Detective Andreoli (400-430).

**Detective Edmund Strauber's** testimony concerning his contact with the defendant at the First Precinct and later at police headquarters on the morning of July 25, 1968, was substantially the same as that given by Detective Andreoli and Inspector Guido (432-442).

**Doctor Leslie Lukash** testified that he was the Chief Medical Examiner of Nassau County (447).

On July 25, 1968, Dr. Lukash performed an autopsy on Lisa Washington (449). His examination revealed eleven stab wounds, 9 on the back, 1 over the right chest and 1 over the right arm (449-450). He found the knife wounds had penetrated the lung space, lung and heart, resulting in massive hemorrhaging which resulted in death (450).

**Defendant's Case**

**Herbert D. Edney**, the defendant, testified that he was 40 years old, divorced with five children and four grandchildren (532-533).

Defendant testified that in July 1968, he resided at 820 Boynton Avenue, Apartment 14B, in the Bronx, with Clara Washington and her daughter, Lisa (534). He had been living with Clara Washington on and off for the previous six years (534).

On the evening of July 22, 1968 he returned to his apartment and discovered that Clara was no longer there and

that everything had been removed except for a bedroom set, some food and his clothes (542-543).

On July 23, 1968, defendant called Mrs. Washington to tell her what had happened (544-545). He was unable to reach Mrs. Washington so he went to visit his brother William in Hempstead (545, 602-603). He told his brother what had occurred and his brother drove him to 201 Princeton Street, where defendant went upstairs and talked to Mrs. Washington (545-546, 605). He also had a conversation with Lucille Glenn concerning the bedroom set in his apartment (546-547, 605).

Defendant returned to the City and went to some bars (547, 607). When he awoke the following day (July 24), he was on the balcony of his apartment and was experiencing the "D.T.'s" (547-548, 607).

He left for work at 10:00 a.m. and met two Spanish girls near the subway whom he did not know (548, 609-610). He told them he would return later and then went to work, where he received his pay check which he cashed (548-549, 611-612). Defendant purchased a knife on 42nd Street with a brown or black handle with a four-inch blade in case the two girls were setting him up for a robbery (549-550, 612-61).

He met the two girls uptown and they went to a hotel. Defendant drank some scotch and beer and smoked marijuana while he was with them (551-552, 613-616). The girls then began to undress defendant who told them not to touch him because he was afraid someone was in the closet or under the bed (552, 619-620). Defendant then paid each $10.00 and left (552, 618, 620).

While walking down Fifth Avenue, defendant suddenly decided to go see his father because he had called defendant and told him that his neighbor, Mr. Medina, had been harassing him (553-554, 622). He took the subway to Penn Station, had several drinks at Savarin's Bar and took the train to Hempstead. During the ride, he smoked a stick of marijuana between the cars, became sick and began throwing up blood (554, 625).

Defendant went to McCann's Bar where he had some more to drink and then went to the bathroom and smoked one-half a stick of marijuana (555, 625-627). Shortly thereafter he was given a ride to Princeton Street by a person whom he could not recall (556, 628). Defendant said he had gone there to give Mrs. Washington some money for Lisa (629-630).

While in the apartment, he had a conversation with Lucille Glenn and Mrs. Washington (556-557, 628-629). A few minutes later Lucille and her husband went into the bedroom and had a fight. Defendant went inside and tried to get them to stop arguing but was not successful (557).

He came out of the bedroom and told Mrs. Washington he was going to buy some beer and then return (557). At that point, Lisa came into the apartment (557, 631, 698-699). Mrs. Washington told Lisa to go to the store to buy some bread (558, 634). Defendant told Mrs. Washington he would buy the bread and asked Lisa if she wanted to come along (558). Mrs. Washington gave Lisa permission to go with him to the store (558, 636-637, 639).

Defendant left the house with Lisa and "Lee Lee" and proceeded to the store (558, 630). While walking there, he

told Lisa that he was going for a few beers and then he was going to go to his father's house and return to the City (558, 633-634). Lisa asked defendant if she could go with him, he refused and Lisa started to pout (558-559).

Just at that moment, Mr. Carter, a cab driver whom defendant had known for a long time, pulled up. Defendant said to Lisa that they would go to his father's and then come back in a while (559, 631-634). Defendant and Lisa got into the cab but "Lee Lee" had disappeared (559). While Mr. Carter drove them to Roosevelt defendant said that Lisa was his daughter (559).

Carter dropped them off at the Nu-Way Lounge because defendant wanted to discuss a business deal with Mr. Patterson, the manager (559-560, 709). Patterson was not there and defendant and Lisa went to another bar, where defendant had several drinks, and then took a cab to his father's house (560-561, 640-641).

While there, defendant went outside and had an argument with Mr. Medina, his father's neighbor (561-563, 701-703). He returned to the house and his sister, Betty, told him that Mr. Medina was crazy and could have hurt him. Defendant said, "Well, I don't have any guns on me but I do have this" (563-564, 706). With that, he took out a knife and as he opened it he cut his thumb and began bleeding over his hand, shirt, pants and shoes (564, 703-706). His sister then took him into the bathroom where she cleaned up his hand and bandaged it (564, 706).

Shortly thereafter defendant's mother called and told his sister that he should take Lisa home right away (564,

707). His mother then called again several minutes later and told defendant to take Lisa home (564).

His sister called a cab and defendant told the driver to take them to 201 Princeton Street (564-565, 707). As they drove past the Nu-Way Lounge, defendant decided to stop there because he thought Mr. Patterson might have returned (565, 707-708). While in the bar, he spoke to Patterson and to Lay Warren and introduced Lisa to both of them (566, 708). He did not recall seeing Joan Turner in the bar that evening (566, 708).

Defendant drank whiskey while Lisa ran around the bar (567, 709-710). He then went to the bathroom and smoked half a stick of marijuana and came out (567, 712). Sometime around 9:00 p.m., he decided to take Lisa home (567, 713).

He called Mrs. Washington and Lucille Glenn answered the phone (567, 710). Defendant told her jokingly that he was going to take Lisa to his father's because he knew that would make her angry (567-568). Lucille started to curse at him and he ignored her, hung up the phone and walked out of the booth (568-569, 713-716).

He had a few more beers and suddenly felt alive only from the waist up as if there was no bottom half to him (569-570, 718). He told this to Mr. Patterson who told him to take Lisa home (570, 718).

Defendant recalled having $2.50 in his hand and that he walked out of the bar across the street towards a cab (570, 718). He tried to get into the cab and then lost con-

sciousness (570, 593, 718-719). The last thing he could remember he was falling and trying to hold on to something (570, 593, 722).

Defendant stated that when he regained consciousness he was under a tree and did not know where he was (570, 722, 734-735). He said his thumb, which he had cut earlier, was bleeding and he felt mist dripping on his face (570-571, 723-725). Defendant realized he was on Andrews Avenue. He went to his father's house, rang the bell, walked inside and blacked out (570-571, 722-727).

Defendant next recalled someone was pounding on him to wake him up (571). He saw a lot of lights in his face and the barrels of several guns pointing at him (572, 705, 727). He did not remember anything about leaving his father's house or going to police headquarters nor could he recall anything which occurred at the police station (572, 573, 580-581, 705, 727-730). The next thing defendant was able to recall was being in the Nassau County Jail some time in October in 1968 (572-573, 729-730).

Defendant testified that when he was in the Nu-Way Lounge on July 24, 1968, he had heard voices and that he still heard voices at the present time (586, 593). No one forced him to drink or take drugs and he did it to chase away the voices which he heard (593).

**Doctor Morris Binder**, a psychiatrist, testified that he examined the defendant on December 21, 1971, and on March 15, 1974 (641-644, 655-656, 692).

He diagnosed the defendant's condition as paranoid schizophrenia of mild severity and in partial remission

(647-648, 675). Dr. Binder believed defendant's condition had been of long standing (648). His opinion was that at the time of the crime, defendant was in a state of mental illness and confusion whereby he was unaware of the nature and quality of his act and did not know that his act was wrong (646).

During the 1971 interview the defendant said that he could recall nothing about what had occurred after he walked out of the Nu-Way Lounge with Lisa (682-684). He had no idea what he was being charged for and he did not believe he could have killed Lisa whom he considered as a stepchild (667-669). Defendant also told Dr. Binder that he had drank heavily and taken drugs including LSD for a period of about 2 or 3 days before the crime (683-684). He described hallucinations which he had been having and said that he had been hearing voices (649). Dr. Binder indicated that taking LSD, marijuana and alcohol would aggravate and accentuate the symptoms of a person who was suffering from schizophrenia (648).

**Erma Harrison,** defendant's oldest sister, testified that she was present at defendant's arraignment in District Court on July 25, 1968 (737, 739-740). She sat in front of the courtroom and that defendant seemed in a daze and did not recognize her (740).

**Betty Jane Boone,** defendant's sister, testified that on July 24, 1968, at approximately 6:30 p.m., she was with defendant and Lisa at her father's house at 35 Andrews Avenue in Roosevelt (744-745). While there, she witnessed an argument between defendant and a neighbor of her father

(746). Defendant returned to the house and said that he was mad at the neighbor and that he would have "cut him" if Lisa and another child were not outside during the argument (746-747).

At that point, defendant took out a knife from his pocket and accidentally cut himself on his left thumb while opening the blade (747, 756-757). He began bleeding and she took him to the bathroom, washed his finger and put a bandaid on the cut (747-748, 757-758).

Ms. Boone said she did not recall being asked the following questions and giving the following answers to Detective Heiser at her home at 5:30 a.m. on July 25, 1968:

> "Q. While you were at your father's house, did your brother, Herbert, have any injuries? A. Not that I saw.
> Q. Did you bandage him? A. Where is he hurt?" (761)

After she had cleaned up the blood, defendant's mother called and told her to tell him to take Lisa home (748-749). Defendant's brother, William, also telephoned and spoke to the defendant during this period (754). She called a cab and told the dispatcher it was to go to Princeton Street in Hempstead (749, 753). The cab arrived and the defendant and Lisa left (749).

**William Edney, Jr.**, defendant's brother, testified that on July 24, 1968, he had received a phone call from defendant sometime around 8:00 p.m. (779-780). Defendant was calling from his father's house and told him that he was still trying to locate Clara and that he had Lisa

with him (779-780). The witness told defendant that the child was not his and that he should take her home right away so that he did not create confusion by giving the impression that he was kidnapping her (780-782). He noticed nothing unusual about the manner in which defendant was speaking to him over the phone at that time (780-783). Mr. Edney said that the defendant called him again shortly after this conversation and told him he was taking the child home (781-782). Defendant did not seem intoxicated to Mr. Edney on either July 23rd or July 24th (783).

**People's Rebuttal Witnesses**

**Doctor Daniel Schwartz**, a forensic psychiatrist, testified that he examined the defendant on March 29, 1970 (799-802).

Dr. Schwartz's opinion was that at the time of the murder, defendant knew and appreciated the nature of his conduct and knew that such conduct was wrong (805, 890). He also found no evidence that defendant was suffering from paranoid schizophrenia, delusions, hallucinations or disoriented thinking (806, 817-818). He believed that defendant had a form of alcoholic psychosis which occasionally manifested itself through hallucinations and delusions (819). He found no evidence of an underlying mental disease or defect (819). The witness said that defendant had a psychopathic personality, or as it was more commonly known, an antisocial personality (819-820).

The doctor was unable to formulate opinion as to whether defendant's claim of amnesia concerning the commission of the crime was legitimate or feigned (888-889).

He said that defendant's amnesia was possibly attributable to a combination of the alcohol which he had consumed prior to the murder as well as a desire to repress an event which defendant could not bear to recall (891-893).

**Doctor John Lanzkron**, a psychiatrist, testified that he examined defendant on April 8 and September 24 of 1969, pursuant to his duties as Assistant Director of Release Activities at Matteawan State Hospital (897).

In his opinion, defendant, on July 24, 1968, did not lack substantial capacity to know or appreciate the nature of his conduct or its consequences or that such conduct was wrong (900-901).

The doctor found that defendant had "selective amnesia" in that he could remember in great detail all the events leading up to Lisa's death other than the actual act of killing (912). He explained that such condition exists where a person represses his memory so as to blot out an intolerable or inconvenient experience (912-913). He believed that defendant's amnesia, which he classified as psychogenic amnesia, was legitimate (913-914). His diagnosis was that defendant was a psychopatic personality and was suffering from a drug and alcoholic psychosis (914-916, 921-922).

**Defendant's Sur-Rebuttal Witnesses**

**Doctor Lawrence Sutton**, a forensic psychiatrist, testified that he examined the defendant on September 10, 1968 with Dr. Pechstein for the purpose of determining whether the defendant was competent to stand trial and not to de-

termine whether defendant was responsible for his crime (938-941). He diagnosed defendant's condition as schizophrenic, chronic paranoid type, and stated that defendant exhibited hallucinatory and delusional thinking which was symptomatic of his condition (946-948).

Dr. Sutton testified that he could give no opinion as to whether defendant, on July 24, 1968, knew or appreciated the nature of his acts or that such acts were wrong because defendant had no memory of them (950).

**Doctor Henry Pechstein,** a forensic psychiatrist, testified that he had examined the defendant on six occasions (978-979).

His preliminary diagnosis after examining defendant in August, 1968 was that defendant had an underlying nervous disorder which might have been schizophrenia with evidence of alcohol and drug psychosis (984-985). In 1970 he found no evidence of mental disease or hallucinations (986-991). However, defendant's condition worsened in May, 1972, apparently due to prolonged imprisonment ("Ganser Syndrome") (989-991).

Dr. Pechstein stated that as a result of his examinations he was unable to form an opinion with any degree of medical certainty with respect to whether defendant knew and understood his acts on July 24, 1968 (995).

# ARGUMENT

**Reception of Dr. Daniel Schwartz' opinion concerning defendant's mental state at the time of the murder did not abridge defendant's Sixth Amendment right to counsel.**

Defendant interposed both a defense of innocence of the acts charged and, to the extent he committed the acts charged, a defense of insanity. In his defense, defendant himself first testified. Then the defendant called Dr. Morris Binder who testified that by reason of mental disease and defect defendant was not responsible for his conduct on the night of the murder (Minutes of Trial at pp. 645-646).

The People, in rebuttal, called Dr. Daniel Schwartz who offered a contrary opinion concerning defendant's mental state at the time of the crime (801-805).* Dr. Schwartz testified that he had examined defendant in the Nassau County Jail on May 29, 1970, at the request of the defendant's then attorney, Irving Tanenbaum, Esq. (801-802, 841). Tanenbaum was not present during the examination (842). That evening, Dr. Schwartz spoke to Tanenbaum over the phone and gave him a detailed report concerning his findings (848). The doctor made no written report concerning his interview of defendant and was not there-

* A second rebuttal psychiatrist, Dr. John Lanzkron, who had examined defendant on two occasions in 1969 pursuant to his duties as Assistant Director of Release Activities at Matteawan State Hospital also testified that defendant was not insane at the time of the crime (895-901).

Defendant produced two sur-rebuttal experts, Drs. Lawrence Sutton and Henry Pechstein. However, neither of these doctors had formulated an opinion with respect to whether defendant had known or understood the nature and consequences of his acts on the date of the murder (Dr. Sutton at p. 950; Dr. Pechstein at p. 995).

after contacted by Tanenbaum or any other attorney for defendant (848, 894). At the request of defendant, Tanenbaum was relieved as defendant's counsel on June 23, 1970.

The Sixth Amendment right to counsel contemplates effective assistance of counsel [*McMann* v. *Richardson,* 397 U.S. 759, 771 n. 14 (1970)] which in turn encompasses, among other things, adequate trial preparation including resort to expert witnesses where appropriate. *United States* v. *Wright,* 489 F.2d 1181, 1188 n. 6 (D. C. Cir. 1973); 18 U.S.C.A. 3006A (e). Where, as here, insanity is the principal avenue of defense at trial, access to psychiatric experts is necessary to assist the attorney in presenting an adequate case. *United States* v. *Taylor,* 437 F.2d 371, 377 (4th Cir. 1971); *United States* v. *Chavis,* 486 F.2d 1290, 1292 (D. C. Cir. 1973). However, contrary to defendant's claim here, once the defense of insanity was interposed, the introduction by the prosecution of the opinion testimony of the psychiatrist (Dr. Schwartz), who had initially interviewed the defendant at the request of the defendant's lawyer, did not violate, or indeed, implicate the accused's Sixth Amendment right to counsel, particularly since, before Dr. Schwartz testified, the defendant had from the witness stand told the jury the same facts he had related to Dr. Schwartz in the pretrial interview.

Defendant anchors his constitutional claim to the theory that any communications between himself and Dr. Schwartz were (1) clothed by the attorney-client privilege, since the doctor was sent to examine him at the request of defense counsel, and (2) the attorney-client privilege, at least to the extent indicated, is embodied in the Sixth Amendment.

Use by an attorney of a psychiatrist to explore the possibility of presenting a psychiatric defense may initially clothe a defendant's communications to the expert from disclosure to anyone other than the attorney, if the expert was presumably brought in to translate those communications to assist the attorney in providing legal advice. *United States* v. *Kovel*, 296 F.2d 918 (2d Cir. 1961). However where the same psychiatrist subsequently appears at trial as an expert witness on the insanity issue, he once again assumes a distinctive identity as a medical expert who occupies a special field of knowledge outside the law and possesses knowledge about the defendant that transcends defendant's communications to him. Thus, as to conversations between the doctor (not his lawyer) and defendant, the People did not call Dr. Schwartz at trial for the express purpose of disclosing those statements. Rather, he was called to state his expert medical opinion concerning defendant's mental state at the time of the murder and the basis for that opinion (805).

Indeed, Dr. Schwartz's interview of defendant constituted but one ingredient of his opinion. The doctor also reviewed defendant's medical records from the various hospitals in which he was institutionalized (808-810, 810-824, 828-831, 834); testimony of certain other witnesses at the trial (825-827); the autopsy report (827-828); reports of other psychiatrists who examined defendant (834); minutes of previous court proceedings (833-834); letters and legal petitions written by defendant (834); and two statements which defendant gave to the police shortly after his arrest (834). Consequently, the "doctor's observations and conclusions, apart from the client's communications to him, constituted knowledge on the part of the doctor which

would be highly material to the case. Thus, in transmitting the 'client's communication' the doctor became far more than a mere interpreter [*i.e.*, a person without whom neither the attorney nor his client could understand the significance of the client's information], for he added an important increment of knowledge of his own. It seems that this knowledge should be treated just like the knowledge of any other witness and should be discoverable from the doctor himself." Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan. L. Rev. 455, 463-464 (1962).

To the extent that Dr. Schwartz's opinion included the conversations the doctor had with defendant, the statements during the examination are to be treated "only as verbal acts from which the expert's opinion [was] drawn," and cannot be admitted at trial as admissions of guilt because a pre-trial psychiatric interview is not a "critical stage of the proceedings" at which the presence of counsel is required since its principal purpose is to enable the expert to gather data from which to form the basis of his opinion. *United States* v. *Baird*, 414 F. 2d 700, 711 (2d Cir. 1969), *cert. den.* 396 U.S. 1005 (1970); 18 U.S.C.A. 4244; Fed. Rules Crim. Proc. 12.2(c). *See also Lee* v. *County Court*, 27 N.Y.2d 432, 441-442, *cert. den.* 404 U.S. 823 (1971). While they include admissions of guilt, we must remember that in an insanity defense, defendant admits guilt. (In the case at bar, defendant, in his interview with Dr. Schwartz, steadfastly maintained that he had not committed the murder [817].) The conversations between doctor and defendant are admitted in order to provide the trier of fact with the knowledge of the foundation of the expert's opinion in

order that the trier of fact may properly evaluate the opinion. Moreover, in the case at bar defendant testified before Dr. Schwartz and told the jury directly what Dr. Schwartz thereafter indicated the defendant had told him in the pre-trial interview.

Infringement, *arguendo*, of the attorney-client privilege does not *ipso facto* mean that the Sixth Amendment right to counsel is implicated.

The attorney-client privilege is designed to protect confidential communications. 8 Wigmore, *Evidence* §2290 (McNaughton rev. 1961). Courts have recognized that "the essence of the Sixth Amendment right is * * * privacy of communication with counsel," *United States* v. *Rosner*, 485 F. 2d 1213, 1224 (2d Cir. 1973), *cert. den.* 417 U.S. 950 (1974). However, in *Rosner*, *supra*, at 485 F. 2d 1227, this Court held that breach of the privilege does not automatically give rise to a transgression of constitutional dimensions. It is premeditated direct intrusions by governmental agencies into attorney-client conversations that have been condemned on constitutional grounds. *Coplon* v. *United States*, 191 F. 2d 749 (D. C. Cir. 1951), *cert. den.* 342 U.S. 926 (1952) [Government wiretapped attorney-client conversations]; *Caldwell* v. *United States*, 205 F. 2d 879 (R. C. Cir. 1953) [secret informer in the defense camp]. *See also Hoffa* v. *United States*, 385 U.S. 923, 306-307 (1966).

In the instant case, there was no "intrusion" of any sort on the communications between defendant and his lawyer. Dr. Schwartz was sent to examine defendant by defense counsel, reported his findings to counsel that eve-

ning and was never contacted by any representative of defendant thereafter (801-802, 842, 848, 894). There is nothing to suggest that the examination was monitored, much less that Dr. Schwartz was acting other than as an independent psychiatrist making an objective evaluation of defendant's mental condition. Indeed, the record shows that the prosecutor first learned of the examination nearly two years after it had taken place (848-849). Clearly, Dr. Schwartz's appearance on behalf of the People at trial on the insanity issue, rather than as a defense witness, was attributable simply to his opinion that defendant did not lack criminal responsibility at the time of the murder. Consequently, we are not dealing with a situation where the prosecutor's conduct was so "manifestly and avowedly corrupt" as to raise the spectre of a Sixth Amendment violation. *United States* v. *Gartner*, 518 F. 2d 633, 637 (2d Cir. 1975), *cert. den.* 423 U.S. 915 (1976). *See also Weatherford* v. *Bursey*, —— U.S. ——, 20 Cr. L. 3059 (Feb. 22, 1977).

Rather, we are here dealing with a defendant who interposed a defense of mental disease and defect, and a prosecutor who sought to present to the trier of fact the available relevant psychiatric testimony on defendant's sanity in order to sustain his burden of disproving the defense beyond a reasonable doubt.

In *United States* v. *Nobles*, 422 U.S. 225 (1975), Nobles' attorney was precluded from offering testimony from his investigator concerning the investigator's interviews with prosecution witnesses because the attorney, citing, *inter alia*, the attorney "work product" doctrine, had refused

to submit certain portions of the investigator's report to the prosecutor, who would presumably have employed it as an impeachment device. Noting that the attorney work product doctrine "shelters the mental processes of the attorney, providing a privileged area in which he can analyze and prepare his clients case," the Supreme Court nevertheless found that, as is the case with any qualified privilege, the privilege derived from the work product doctrine could be waived.* Nobles' attorney could not, on the one hand, offer the investigator's testimony for the purpose of discrediting the prosecution's witnesses' identification of his client, and then, by virtue of the work product doctrine, preclude the prosecutor from testing the investigator's credibility.

The Court also rejected the argument that even limited infringement of the attorney work product doctrine would have deleterious consequences on a defendant's right to effective assistance of counsel:

> "We cannot accept respondent's contention that the disclosure order violated his Sixth Amendment right to effective assistance of counsel. This claim is predicated on the assumption that disclosure of a defense investigator's notes in this and similar cases will compromise counsel's ability to investigate and prepare the defense case thoroughly. Respondent maintains that even the limited disclosure required in this case will impair the relationship of trust and confidence between client and attorney and will inhibit other members of the 'defense team' from gathering information essential to the effective preparation of the case. . . .

* The Supreme Court recognized the work product doctrine to be "distinct from and broader than the attorney-client privilege." (422 U.S. at 238, n. 11.) *See Hickman* v. *Taylor*, 329 U.S. 495, 508 (1974).

> The short answer is that the disclosure order resulted from respondent's voluntary election to make testimonial use of his investigator's report . . ." (422 U.S. at 240, n. 15).

The principle which emerges from *Nobles*, that the adversary system does not tolerate the presentation of "half-truths," is hardly a novel one. Thus, a defendant cannot testify in his own behalf and then fob off cross-examination by asserting his privilege against self-incrimination. *Brown* v. *United States*, 356 U.S. 148, 154-156 (1958). Nor will a defendant be permitted to testify falsely at trial secure in the knowledge that a previous contradictory statement, albeit obtained in derogation of his *Miranda* rights, will not be available to the prosecutor as an instrument of impeachment. *Harris* v. *New York*, 401 U.S. 222, 225-226 (1971). Indeed, the "search for truth," which is the foundation of the adversarial process, applies equally to the prosecution as well as to the accused. *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963). "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams* v. *Florida*, 399 U.S. 72, 82 (1970).

These principles have also been applied to the attorney-client privilege. The defendant in *United States* v. *Woodall*, 438 F. 2d 1317, 1322-1326 (5th Cir.) [rehearing en banc], *cert. den.* 403 U.S. 933 (1971), testified that he was unaware of the sentence consequences at the time he had entered a guilty plea. The attorney who represented him at the time of the plea was permitted to testify that he had, in fact, advised defendant of the sentence consequences. The Court held that by defendant having offered his own testimony on

the issues presented, defendant waived the privilege, thus enabling the attorney to give his version of their conversation prior to the plea. *See also Roberts* v. *Greenway*, 233 Ga. 473, 211 S. E. 2d 764 (1975); *State* v. *Lawonn*, 113 Ariz. 113, 547 P. 2d 467, 468-469 (1976); *Beckette* v. *State*, 31 Md. App. 85, 355 A.2d 515 (1976). In *Singleton* v. *State*, 90 Nev. 216, 522 P. 2d 1221 (1974), an insanity defense was interposed. Defendant, in addition to a medical expert, offered testimony relating to his proferred insanity from several attorneys who had previously represented him. On rebuttal, the State produced yet another of defendant's former attorneys who testified that he had found defendant to be a lucid individual. On appeal, the Nevada Supreme Court determined that by calling his former attorneys on his direct case, defendant was foreclosed from raising the attorney-client privilege to the rebuttal witness.

A similar concept of reciprocal fairness designed to promote the attainment of truth of defendant's sanity pervades the case at bar. Defendant's contrary argument, that denial of the privilege will deter frankness and cooperation by the accused lest there be subsequent disclosure of his communications during the psychiatric interview should the expert be called as an adversary's witness, ignores the requirement under both federal and New York law that the prosecution is entitled to have its own psychiatrist examine a defendant and that failure to cooperate precludes presentation of defense experts on the insanity issue. Fed. Rules Crim. Proc. 12.2 (d); *United States* v. *Baird*, *supra*, 414 F. 2d at 712; *Lee* v. *County Court*, *supra*, 27 N.Y. 2d at 442; *People* v. *Edney*, *supra*, 39 N.Y. 2d 620 (1976). Thus, as stated by the New York Court of Appeals in the case at bar:

"A defendant who seeks to introduce psychiatric testimony in support of his insanity plea may be required to disclose prior to trial the underlying basis of his alleged affliction to a prosecution psychiatrist (citations omitted). Hence, where, as here, a defendant reveals to the prosecution [psychiatrist] the very facts which would be secreted by the exercise of the privilege, reason does not compel the exclusion of expert testimony based on such facts, or cross-examination concerning the grounds for opinions based thereon. It follows that no harm accrues to the defense from seeking pretrial psychiatric advice where an insanity plea is actually entered, for in such circumstances, the underlying factual basis will be revealed to the prosecution psychiatrist. Conversely, were the defendant not to enter an insanity plea, no physician-patient waiver would occur and any information divulged to the psychiatrist would remain privileged. There is, therefore, no deterrent to seeking expert psychiatric advice for in one instance, there will be disclosure to the prosecution in any event and, in the other, disclosure will never occur. In short, no reason appears why a criminal defendant who puts his sanity in issue should be permitted to thwart the introduction of testimony from a material witness who may be called at trial by invoking the attorney-client privilege anymore than he should be able to do so by invoking the physician-patient privilege." *People* v. *Edney, supra,* 39 N.Y. 2d at 625.

In essence, defendant insists that he should have been permitted to produce psychiatric evidence to the effect that he was not responsible for his criminal acts by reason of mental disease or defect, while at the same time precluding

the People from offering an expert witness, who had formulated a contrary opinion, simply because the latter had examined defendant at the behest of a former defense counsel as opposed to being court-appointed or retained by the prosecution. Thus, defendant suggests that he be permitted to suppress any unfavorable psychiatric witness whom he had retained in the first instance, under the guise of attorney-client privilege, while he endeavors to shop around for a "friendly" expert, and takes unfriendly experts off the market.

In the same vein, defendant argues that he will be "chilled from being entirely open and frank with his psychiatrist" if he knows that the psychiatrist may ultimately be permitted to testify he is sane. At the same time defendant admits that "he must cooperate fully" with a prosecution designated psychiatrist. (Defendant's brief, pp. 35 and 37). Thus, as a practical matter, were defendant's position to be sustained, the inevitable result would be to assure candor with any "defense camp" psychiatrist, while providing defendant an opportunity to be less than candid with a prosecution designated psychiatrist who might later surface as an adverse witness.

Not only does defendant's assertions fly in the face of the salutary concept that the trier of fact should have adequate access to psychiatric testimony where the issue at trial is insanity, it further offends the notion that the adversary system is a "search for truth" rather than a "poker game." *See United States* v. *Meyer*, 398 F. 2d 66, 76 (9th Cir. 1968). Certainly defendant would have originally retained and produced Dr. Schwartz had his opinion

been favorable to defendant's position. Just as clearly, under *Brady* v. *Maryland, supra,* had the People retained Dr. Schwartz initially and had he found defendant to be insane, the prosecutor would have been under a legal obligation to disclose that information to his adversary and Dr. Schwartz would have been permitted to testify for the defendant. Therefore, the trier of fact in the case at bar should not have been deprived of the opportunity to obtain complete insight into defendant's claim of insanity merely because one of the expert witnesses who had examined him had done so at the request of one of defendant's former attorneys. *United States* v. *Nobles, supra,* 422 U.S. at 241.

Should this Court determine that it was improper for Dr. Schwartz, in discussing the basis in part for his expert medical opinion, to have disclosed conversations between defendant and himself, such evidence is here harmless.

Dr. Schwartz, the State's *rebuttal* witness, revealed no "communications" by defendant or other facts which defendant himself had not told the jury during his own testimony on *direct* examination or which had not been disclosed during the testimony of defendant's own psychiatric experts, Drs. Binder, Pechstein and Sutton. In fact, a comparison of the doctor's testimony concerning what defendant had related to him with reference to the commission of the crime (811-817) and defendant's own testimony on this point (537-572) establishes that the two ver-

sions are virtually identical.* Thus, the information gleaned from defendant during the 1970 psychiatric interview with Dr. Schwartz could just as easily have been imparted to the doctor in the form of a hypothetical question at trial [N.Y. CPLR 4515], even though such a question would have necessarily encompassed what are now claimed to have been privileged communications.

Moreover, Dr. Schwartz's opinion concerning defendant's lack of substantial capacity at the time of the murder, his diagnosis of defendant's mental condition and his analysis of defendant's inability to recall the stabbing corresponded in all respects with the psychiatric evaluation of defendant by the People's other rebuttal expert, Dr. Lanzkron. (805, 819-820, 888-893) [Dr. Schwartz]; 900-901, 912-916, 921-922 [Dr. Lanzkron]). *People* v. *Lines*, 13 Cal. 3d 500, 119 Cal. Rptr. 225, 236, 531 P. 2d 793, 804 (1975). *See also People* v. *Sugden*, 35 N.Y. 2d 453, 461-462 (1974).

Finally, we must observe that a claim relating to the ineffective assistance of counsel normally challenges the

* Dr. Schwartz testified that defendant had discussed with him at the examination the events surrounding the commission of the crime (805-806). The defendant had told him he had drunk heavily for years (806, 810); that he had been sent to jail for assaulting his wife (806) and later for forgery (808); that he had been hearing "voices" for many years (807-808); and that he had been hospitalized on several occasions (808-810). Defendant also discussed his relationship with Clara Washington (810-811) and said he was not angry when she left him (811). Dr. Schwartz also related defendant's explanation of his activities from the time Clara left him until after his arrest (811-817). The doctor testified that defendant had continually maintained that he had not killed Lisa (817). Dr. Schwartz did not dispute defendant's claim of amnesia with respect to the actual murder of Lisa (888-889), nor did his testimony contradict in any material way any factual allegations set forth in defendant's previous testimony. *Cf. State* v. *Kociolek*, 23 N.J. 400, 129 A. 2d 417, 423 (1957); *People* v. *Hilliker*, 29 Mich. App. 543, 185 N.W. 2d 831, 832-833 (Ct. of App. 1971).

integrity of the fact-finding process. However, that is not here true. The exclusion of the psychiatrist's opinion is urged on the theory that it represents, at least in part, the tainted fruit of a breach of constitutionally privileged communications between the defendant and the psychiatrist. There is no claim that the psychiatrist's opinion is false or unreliable on the question of defendant's sanity. Rather, exclusion is sought on the rationale that it is necessary to deter the use of such privileged communications. To the extent, therefore, that the primary objective of exclusion in the case at bar is deterrence, and Edney unquestionably had a full and fair opportunity to present his claim to the New York courts, federal courts should abstain from further adjudication of the issue. *See Stone* v. *Powell*, —— U.S. ——, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).

## Conclusion

***The order of the District Court should be affirmed.***

Respectfully submitted,

DENIS DILLON
District Attorney, Nassau County
*Attorney for Respondent-Appellee*

WILLIAM C. DONNINO
ROBERT N. ZAUSMER
Assistant District Attorneys
*Of Counsel*

**Affidavit of Service by Mail**

**In re:**

United States of America ex rel. Herbert Edney,
v. Harold Smith, Superintendent, Attica Correctional Facility

State of New York
County of New York, ss.:

Michael Lane,

being duly sworn, deposes and says, that he is over 18 years of age. That on MAR 8 - 1977, 197..., he served 3 copies of the within Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Mathew Muraskin, Esq.
Chief, Appeals Bureau
Legal Aid Society, Nassau County
400 County Seat Drive
Mineola, New York 11501

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Michael Lane

Sworn to before me this
day of MAR 8 - 1977 197...

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1977